No. 59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

UNITED STATES OF AMERICA, *Petitioner,*

against

FIRST NATIONAL CITY BANK, *Respondent,*

and

OMAR, S. A., a Uruguayan corporation; LAZARD FRERES & CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING CORP.; BELGIAN-AMERICAN BANK AND TRUST CO., and FIRST NATIONAL CITY TRUST CO., *Defendants.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT BRIEF FOR THE CHASE MANHATTAN BANK, THE FIRST NATIONAL BANK OF BOSTON AND BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, AS *AMICI CURIAE*

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Opinions Below

The opinion of the United States District Court is reported at 210 F. Supp. 773. The opinion of the United States Court of Appeals for the Second Circuit, and the dissenting opinion, are reported at 321 F. 2d 14. The *per*

curiam opinion of the Court of Appeals, sitting *en banc* on rehearing, is reported at 325 F. 2d 1020.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Government's brief (p. 1).

Question Presented

Whether for the purpose of aiding the Government in collecting taxes allegedly owed by an alien, a United States District Court has the power, by service of process on the head office of an American bank, to order the freezing, and ultimate transfer to the United States, of a debt owed by a foreign branch of that bank, when the alien can collect that debt only at the branch outside of the United States.

Statutes Involved

The pertinent statutes are set forth at pages 38 through 43 of the Government's brief.

Statement

The action was brought by the Government, the petitioner herein, against defendant Omar, S. A., respondent First National City Bank and the other defendants named above. The complaint alleged that defendant Omar was indebted to the United States for unpaid taxes, penalties and interest. It prayed for injunctive relief against respondent and the other defendants, alleging that they held property of Omar encumbered by Federal tax liens. In addition to its prayer for an injunction *pendente lite* order-

ing the defendants to refrain from disposing of Omar's property, the Government sought an order compelling those defendants to return all property and property rights of Omar, including any sums held abroad for the account of Omar in foreign branches of defendant banks, to the jurisdiction of the United States District Court for the Southern District of New York.

The District Court granted the Government's motion for temporary relief against all defendants (except First National City Trust Co. and Belgian-American Bank & Trust Co. which had shown satisfactorily that they did not hold property of Omar), ordering them to refrain from disposing of any property or rights to property held for Omar's account by defendants or their branches, agents or nominees, whether or not their branches, agents or nominees, were located within the United States.

Respondent appealed from so much of the District Court's order as restrained the disposition of any property of Omar held outside of the United States by respondent's foreign branches. On June 26, 1963, the Court of Appeals sustained the appeal (one Judge dissenting), vacated the District Court's order in part and remanded the case for modification of the injunction. On September 19, 1963, the Court of Appeals granted the Government's petition for a rehearing *en banc*. On January 13, 1964, the Court of Appeals adhered to its prior decision, reversing the District Court, by a vote of 4-3.

Because of the importance of this case to the foreign operations of American banks in general, The Chase Manhattan Bank, The First National Bank of Boston, and Bank of America National Trust and Savings Association sought,

and obtained, the consent of the attorneys for the Government and respondent to submit this joint brief, as *amici curiae*.

Summary of Argument

This case involves serious questions concerning the powers of a United States District Court, as well as important considerations of foreign branch banking and United States foreign economic policy. It is these relevant policy considerations with which the present *amici* wish to deal, in the main.

The Government's brief shows a shift in the legal grounds of its contentions. Legally, its new arguments have no more force than their arguments had below. The new arguments, however, do make the policy considerations against the attempted assertion of power stand out even more forcefully.

Apparently, the Government now recognizes that under the law of New York, controlling in this case, foreign branch deposits are not subject to attachment or execution by process of New York courts, and therefore are not subject to federal tax levy in New York because they are neither "property" nor "rights to property" in New York. The Government now argues that the injunction issued against respondent was no more than an attempt to maintain the *status quo* while the Government seeks personal jurisdiction over the taxpayer. This argument begs the question. Deposits in a foreign branch of an American bank, which deposits are debts of the branch (and only the branch) to its customers, constitute under the law of New York property situated outside the United States for that is where the sole debtor, the branch, is located. Therefore, such deposits are beyond the jurisdiction of a United States Dis-

trict Court sitting in New York, whether the asserted power is attempted to be exercised through enforcement of a lien or through an injunction since process cannot validly be served on the branch-debtor.

Whatever the attempt to exercise control over such funds be labeled, the forceful policy reasons militating against such a purported exercise of jurisdiction remain the same.

ARGUMENT

POINT I

The District Court had no power to issue orders purportedly affecting the disposition of deposit-debts of respondent's foreign branch for it had no jurisdiction over the creditor-customer or the debtor-branch.

As the Court of Appeals explicitly held, the District Court had no power to issue orders affecting the disposition of bank deposits in the foreign branch of an American Bank, which deposits were payable solely at the foreign branch. As shown in the opinion of the Court of Appeals, this holding is amply supported by the law of New York, controlling on this point. In New York, a depositor of a foreign branch of an American bank has no right to obtain payment of the deposit-debt at the bank's domestic-office in New York, and thus, the deposit-debt cannot be affected by legal process served in New York for there is no debtor, and thus no debt, in New York.

The Government's brief concedes the essential legal propositions. It concedes that the Government's lien extends only to "property within the district" (Br. pp. 24-25). It concedes that such lien extends only to "such prop-

erty as the taxpayer has or is entitled to under State law" (Br. p. 30). It concedes that under New York law, the situs of a foreign branch bank deposit is solely in the country where the branch is located for it is only at the branch that the depositor can demand payment and, therefore, the only debtor is the branch (Br. p. 21).

Having conceded the vital component propositions, the Government seeks to avoid the inevitable conclusion by dealing in irrelevancies. All of the Government's arguments are defective in that they fail to deal with the fundamental issue—how can a United States court control the disposition of a debt when it does not have jurisdiction over the creditor (Omar) or the debtor (the Montevideo branch). See *Hanson* v. *Denckla*, 357 U. S. 235 (1958). Thus, for example, the Government in suggesting that it merely wants an injunction against payment of the deposit-debt to Omar to preserve that debt while it attempts to serve Omar (Br. pp. 10-23) neglects to consider the essential fact that the debtor-branch, the only entity with a duty to pay, cannot be served with an order providing for an injunction, temporary or permanent. The authorities cited by the Government are inapplicable for they deal with situations in which the court's judgment, by reason of the court's jurisdiction over the parties or a *res*, controlled the parties and protected them from multiple liability In the present case, the District Court did not have jurisdiction over the debtor, the creditor or any *res*, and thus, its orders could not protect the debtor-branch in any way.

The Court of Appeals recognized and applied long-established legal principles governing foreign branch deposits and the policy justifications for such principles. It further recognized that whatever the order of the District

Court was denominated (*e.g.*, a garnishment, an injunction), it was repugnant to those principles and their underlying policy. The dissenters in the Court of Appeals, like the Government in its brief, were unable to cite any authority which contradicted those principles in any way.

There is no basis in law for the reversal of the determination of the Court of Appeals. The Government's arguments are no more than short-sighted pleas for extraordinary powers, repugnant to established legal principles and the objectives of sound national policy.

POINT II

Significant policy considerations militate against reversal of the Court of Appeals and sanctioning the broad powers which the Government seeks.

A. Adverse Effects on Foreign Branch Banking and upon American Foreign Economic Policy.

Aside from the purely legal considerations relative to the status of foreign branch bank deposits, this case poses serious questions with respect to foreign branch banking and United States foreign economic policy. The decision of the Court of Appeals is consistent with the aims of that policy.

A contrary decision, authorizing the freezing of customers' deposits in foreign branches of American banks and their ultimate transfer to the United States, would deter the establishment, and continued maintenance, of such foreign branch deposits and, consequently, impair the successful operation of foreign branches. It would, thus, conflict directly with avowed Congressional and Executive

policy of encouraging foreign branch operations. Moreover, it would adversely affect the American international balance of payments.

Congress recognized the vital place of foreign branches in a sound American banking system at the very inception of the Federal Reserve System. The Federal Reserve Act makes explicit provision for the establishment of American banking machinery in foreign countries and, by limiting restrictions to a minimum, affords the broadest opportunity for this type of export of American business.

In 1962, Congress evidenced its continued vital interest in this area through the enactment of P.L. 87-588, 76 Stat. 388 (1962), which amended the Federal Reserve Act to free foreign branches from many of the restrictions on United States domestic banking and to permit them to engage in banking on a par with indigenous institutions. This legislation, designed to improve the competitive position of these branches, was the direct result of a recommendation made by the Board of Governors of the Federal Reserve System. See LEGISLATIVE RECOMMENDATIONS OF THE FEDERAL SUPERVISORY AGENCIES TO THE SENATE COMMITTEE ON BANKING AND CURRENCY, Study of Banking Laws (Comm. Print, 1956), p. 111. The legislative history of P.L. 87-588 demonstrates a clear Congressional policy favoring *effective* foreign branch banking as an instrument to ease the problems of balance of payments and gold outflow. See *S. Rep. No. 738, 87th Cong., 1st Sess.* p. 2 (1961). See also *H.R. Rep. No. 2047, 87th Cong., 2d Sess.* (1962).[1]

[1] The Government argues (Br. p. 35) that the legislative history of P.L. 87-588 indicates that "Congress explicitly manifested an intention to prevent these facilities from being used by tax evaders". What the quotation from the House Committee Report says is that the Committee does not believe or intend that the legislation—granting additional powers to foreign branch banks—should offer any opportunities for tax evasion. Moreover, that legislation in no way added to the power of foreign branch banks to accept deposits.

The continued vital role of foreign branch banking in the United States economy has been heavily underscored in recent reports to the Executive Branch. See e.g., ADVISORY COMMITTEE ON BANKING TO THE COMPTROLLER OF THE CURRENCY, REPORT, National Banks and the Future (1962), p. 130; COMMISSION ON MONEY AND CREDIT, REPORT, Money and Credit (1961), p. 212. Such reports noted the value of foreign banking operations in stimulating world trade and investment, in strengthening the American position with respect thereto, and in reducing the drain on dollar funds by enabling American corporations to finance, in part, their own overseas activities through local currency deposits with foreign branches of American banks. The Advisory Committee stated:

> "The stimulation of world trade and investment is an important factor in the challenging and rapidly changing world situation of today. With the completed reconstruction of Western Europe, the emergence of the European Common Market, the clear and present needs of the less developed parts of the world and the continuing improvement in world trade and finance, it is in the national interest of the United States to encourage the growth of institutions which will foster world trade and investment. These institutions include Edge Act and agreement Corporations and also foreign departments and branches of United States banks. It is vital that unnecessary and burdensome restrictions on all these types of foreign activities by American banks be eliminated if we are to maintain and strengthen our position in world trade and finance." ADVISORY COMMITTEE ON BANKING TO THE COMPTROLLER OF THE CURRENCY, REPORT, National Banks and the Future (1962), p. 130.

The Committee concluded its discussion of international banking by saying:

> "By and large, the cardinal principle which should guide the authorities is the need to insure that U. S.

banks, in their international operations, become *as competitive as possible* and thus help strengthen the American role in the world economy." Id., 133. (Emphasis added)

The fostering of foreign branches of American banks is thus a policy of Congress and the Executive Branch. A decision contrary to that of the Court of Appeals would conflict with those clearly expressed national policies.

In arguing for the immunity of foreign deposits from the kind of assertion of power that the Government is here attempting, the concern of the American banks engaged in international banking is not to protect the "artful tax dodger"—one who through one artifice or another available in the international scene will not be stopped by a. y *tour de force* concocted in this case. American international banking is, on the other hand, concerned with the many responsible individuals in commercial and industrial establishments abroad who have business contacts with the United States and are repelled by the extraordinary complexities of our tax system. Faced with uncertainty, they may well elect to avoid the risk of unwitting entanglements that might flow from doing business with the foreign branch of an American bank.

The Government argues (Br. pp. 35-37) that the law-abiding foreign depositor will not be dissuaded from using American branch banks because his deposited funds could only be "frozen" if there were a reasonable possibility that he could be lawfully served with process in the United States and because the new Treasury Department Regulation (26 C.F.R. 301.6332-1), issued at the time of the petition for certiorari in this case, supposedly contains limi-

tations on the power of the Internal Revenue Service to institute judicial proceedings to reach foreign branch deposits.[1] The arguments under Point I fully answer this contention. Moreover, if the Government's position (Br. pp. 17-18) as to the reach of new state "long arm" statutes (the constitutional validity of which is unsettled) is supported by the decision in this case, depositors in foreign branches of American banks will have even more reason to fear for their deposits. The damage that could be done to the American balance of payments by full acceptance of the Government's argument before this Court is evident. A recent study has concerned possibilities of encouraging foreign investment in American securities.[2] It is quite evident that if the Government's claim (Br. pp. 17-18) that any property, wherever located, belonging to a foreigner who has been served with process under the "long arm" statutes can be reached by an order *in personam*, foreigners will be reluctant to invest in America at all. Certainly, the so-called limitations on the authority of the Commissioner of Internal Revenue under the recent Treasury Regulation would be farcical indeed.

The Court of Appeals refused to adopt a rule of law that would be deleterious to the foreign operations of American banks and thus repugnant to the principles of sound economic policy while gaining nothing in terms of tax administration. No other decision would have been reasonable.

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[1] Such "limitations" must be viewed with caution for they are self-imposed and may well be abolished if the Secretary should deem it necessary.

[2] TASK FORCE ON PROMOTING INCREASED FOREIGN INVESTMENT, REPORT (1964).

B. Problems of Foreign Policy and Conflicts of Law Among Nations.

The majority opinion of the Court of Appeals saw clearly the pernicious possibilities inherent in the Government's attempt to give extra-territorial effect to its tax collection efforts.

> "In addition, the rule suggested by the Government would have to work both ways. As yet, our courts have been faced only with cases seeking to attach deposits in foreign branches of American banks by service on the home office here . . . and others seeking to attach deposits in foreign banks by service on a branch of such bank doing business in New York. . . . However, it is inconceivable that the issuance of an injunction by a court of a foreign country against an American branch bank affecting the accounts or activities of the head office in the United States would be looked upon with favor. *The untoward difficulties and potential conflict between the laws of different nations that such a doctrine would produce militate against giving it support here.*" 321 F. 2d at p. 24. (Emphasis added.)

The whole structure of the rules of conflicts of law or, as it is sometimes described, private international law, is designed to avoid the kind of situation for which the Government is arguing here—a situation in which a sovereign asserts jurisdiction over property not within its territory for the purposes of controlling the disposition of such property and, because of this improper arrogation of power, the sovereign of the situs of the property is, to say the least, offended. This Court has recently recognized the fundamental basis of this structure in its reference in the *Sabbatino* case to the "deep seated" "concept of territorial sovereignty." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 432 (1964). New York's rule concerning foreign

branch deposits recognizes that in the case of such deposits, jurisdiction and control must be left to the host country, the territorial sovereign of the branch, and New York courts consistently defer to that sovereign. The Court of Appeals also felt that courts should not involve themselves in the problem of extra-territorial collections of tax revenues through freezing or seizure of property outside of the United States, and that the District Court must defer "in this highly sensitive area of intergovernmental relations." (321 F. 2d 14, 24).

If the converse of the Government's argument here is contemplated, the contents of the Pandora's box which the Government seeks to open are, as the Court of Appeals suggested, immediately apparent. Certainly the United States Government would look with extreme disfavor upon the order of a foreign court, which was served on a foreign branch of an American bank and purported to "freeze" a deposit in the United States because of the depositor's alleged foreign tax liability to the foreign sovereign.

The assertion by the courts of one nation of extra-territorial jurisdiction, in an effort to affect title to or the disposition of property in another nation, is an extraordinarily delicate matter which must be approached with utmost care. It may be, as the Government asserts, that in a certain limited number of cases, a court can, and should, order a person over whom it has *in personam* jurisdiction to take certain actions with respect to property outside of the national territory. However, this power ought not be exercised when the situation involves a party who is not an American citizen, when the proceedings are to enforce alleged tax liability or when the only person before the court is an innocent third party—for example, a bank whose

foreign branches have solemn obligations under the laws of their host sovereigns. To hold otherwise would give rise to pernicious and dangerous results which could only upset delicate balances of comity recognized among sovereign nations.

This court saw excellent reasons in the *Sabbatino* case for judicial self-restraint. It is submitted that the reasons against the extension of power sought by the Government in this case are even stronger.

C. Subjection of an Innocent Party to Substantial Liability.

Foreign branches of American banks are subject to, and must comply with, the laws of the foreign lands in which they do business. Under the laws of these foreign jurisdictions a branch depositor would continue to have a cause of action against the foreign branch for payment of his deposit even though the home office of the bank had purported to freeze or transfer the deposit pursuant to the order of a United States District Court. Such fact is no doubt one of the strongest bases for New York's rule against assertion of jurisdiction over such deposits. As noted above (Pt. IIB.) the New York rule wisely recognizes that foreign branch deposits, particularly those of residents of the host country, are viewed by the host sovereignties as local property, subject only to local law and jurisdiction. An order of a United States court purportedly affecting disposition of such a deposit would not protect the foreign branch from liability in the host country to its customer.

No claim is made in this case that respondent itself is liable for the Government's claims against Omar. So far as the controversy between the Government and Omar is concerned, respondent is an innocent bystander. In effect,

if the Government's position is sustained, respondent, although wholly innocent and in no way a party to any controversy between the Government and its customer, will be compelled to pay, from its own resources, at least a part of the tax allegedly due—i.e., to the extent of the amount of the deposit. For such would be the result if the bank were compelled to comply with a transfer order of a United States court, and, subsequently, were called upon to pay its depositor under a judgment of a foreign court. Therefore, to adopt the Government's position would not only tend to destroy the competitive position of foreign branches of American banks, but would also thrust upon American banks with foreign branches potential losses in very substantial amounts.

Nor would these losses be theoretical or speculative. Surely, Omar can be expected to claim any deposit with respondent's branch in Uruguay and, surely, the Uruguayan court can be expected to enforce such claim against respondent's branch (see Appendix to Respondent's brief). Conceivably, if such branch is compelled by an Uruguayan court to repay Omar, it might have a constitutional right to recoup from the United States Government to the extent of its double payment. See *Cities Service Co.* v. *McGrath*, 342 U. S. 330, 335 (1952). But even if there is such a theoretical constitutional right, in order to claim it, the branch would have to refuse Omar's payment order, deny liability for the deposit in the suit brought against it by Omar, with consequent damage to its standing in the local community, and after losing the Uruguayan suit bring an action against the United States Government. The entire maneuver would be nothing more than an exercise in futility by the tax collector at the expense of respondent's reputation and corporate funds.

Since foreign branches of American banks play an important part in our national economic policy, the entire procedure would only serve to tarnish and blunt these vital instruments of foreign commerce.

Conclusion

As the decision of the Court of Appeals is supported by unassailable authority, is entirely consistent with American foreign economic policies and reflects proper concern for the rights of innocent parties, it should be affirmed.

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